IN THE SUPREME COURT OF THE UNITED STATES

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JAY SHAWN JOHNSON, :

Petitioner :

v. : No. 03-6539

CALIFORNIA. :

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Washington, D.C.

Tuesday, March 30, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

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SETH K. SCHALIT, ESQ., Supervising Deputy Attorney General; San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-6539, Jay Shawn Johnson v. California.

Mr. Bedrick.

ORAL ARGUMENT OF STEPHEN B. BEDRICK

ON BEHALF OF THE PETITIONER

MR. BEDRICK: Mr. Chief Justice, and may it please the Court:

I would like to address three points.

First, the correct prima facie standard under Batson is whether there is sufficient evidence to permit a reasonable judge to infer discrimination. The California threshold is too high and incorrectly conflates step one and step three of Batson analysis.

QUESTION: Well now, Mr. Bedrick, are -- are you talking about enough evidence, say, to -- for a trial judge to let a case go to a jury or enough evidence to persuade a trial judge who's sitting as the finder of fact? I think those are two different things.

MR. BEDRICK: I would say the former rather than the latter, Your Honor. I'm suggesting sufficient evidence to permit a reasonable trial judge to infer that there was racial discrimination in jury selection.

QUESTION: So it -- it doesn't have to be proven

by a preponderance of the evidence.

MR. BEDRICK: Absolutely not. California uses a standard of preponderance of the evidence and we believe that is substantially higher than that which the -- the standard which this Court suggested in Batson and in Purkett v. Elem and in Hernandez v. New York. This standard is substantially higher than used by anywhere else in the country.

QUESTION: What's the best analog that you have? Probable cause doesn't seem to fit. Reasonable suspicion, reasonable grounds for belief. Are -- are there cases which tell us what little semantic formulation you want to use?

MR. BEDRICK: That's a good qùestion. In discussion with associates, we thrashed that around. Probable cause is much too high. Reasonable suspicion, which is lower than probable cause, starts to get near it, but I know the Court had a reasonable suspicion case last week and I don't know all the intricacies of it. My sense is somewhat --

QUESTION: Well, that's -- that's not the standard for letting a case go to the jury, though. It seems to me that if that's what you're appealing to, what the test ought to be is not whether the judge thinks it's more likely than not, but whether a reasonable jury could

think that it's more likely than not. Surely that's the standard for letting a case go to the jury, not a suspicion. You know, if the judge thinks --

MR. BEDRICK: No.

QUESTION: -- he has to say a reasonable juror could find that it is more likely than not that the plaintiff's case is -- is sustainable. Isn't that the test for going to the jury?

MR. BEDRICK: When the test goes to the jury, the plaintiff has the burden of proving his case by a preponderance of the evidence.

QUESTION: The jury has to find it by a preponderance.

MR. BEDRICK: Yes.

QUESTION: But in order to let it go to the jury, I had always thought that the criterion was not whether the judge thought it was more likely than not but whether in his view a reasonable jury could think it more likely than not.

MR. BEDRICK: I think that is close to the test that I'm asking for, Your Honor.

QUESTION: Okay.

QUESTION: You had a model --

QUESTION: Of course, that standard applies after the -- after the case has been -- has been tried and

-- and both sides have had an opportunity be heard. All -- all you're asking for is the opportunity to make inquiry.

MR. BEDRICK: Absolutely, Your Honor. All we're asking is that prosecutor be -- or the -- or the challenger, whoever that may be, be asked the reason. So what we are ask -- our standard is somewhat closer to a discovery standard.

QUESTION: You're asking more than that. You're asking under our law that if the -- if the prosecutor doesn't come back with a reason, you win.

MR. BEDRICK: Absolutely not, Your Honor.

QUESTION: You're not?

MR. BEDRICK: I respectfully disagree. The series --

QUESTION: The -- the prosecutor can stand silent and -- and -- and the -- the judge can still find against you.

MR. BEDRICK: Very much so because the -- the series of cases from this Court, the Batson-Hernandez-Elem trilogy, and -- and also the -- some of the Title VII cases provide that even though the burden of producing evidence shifts, the burden of persuasion never shifts. So --

QUESTION: But the persuasion burden would be

for the jury if you submit enough to make out a prima facie case. The Title VII cases deal with a situation where you've made the prima facie showing. You don't necessarily win if the defendant comes up with a nondiscriminatory reason. But if the defendant just stands silent -- you've made your prima facie case. Defendant says nothing. Don't you win at that point?

MR. BEDRICK: No, Your Honor, I do not win either under Batson or under Title VII. This Court decided a couple of cases, including Reeves and St. Mary's Honor Center in which the finding was a prima facie case was made, the employer gave a reason, the trial judge said I disbelieve that reason --

QUESTION: Yes, of course, but suppose the employer gives no reason.

MR. BEDRICK: I don't --

QUESTION: Suppose that the prosecutor stands silent. Those are all cases where the prosecutor does what you would expect. The defendant does what you expect: come up with a reason. But if no reason is given --

MR. BEDRICK: In the Batson context, Your Honor, we have never come across a case -- there may be one. We have never come across one where the prosecutor stood silent. The prosecutor always has a reason.

QUESTION: Well, you -- you were asked to consider what -- what does it mean, this prima facie case, if the defendant does stand silent. It may be implausible that the prosecutor would or a defendant would in Title VII.

MR. BEDRICK: Yes, but even so, even -- even in this theoretical and I think inconceivable hypothetical situation, if the challenger stood silent, the trial judge still has to determine whether or not the objector has proven discrimination at that point, at stage three, by a preponderance of the evidence.

QUESTION: I -- I suggest that the reason you've never come across a case in which the prosecutor stands silent is because the prosecutors know that if they stand silent, they lose.

MR. BEDRICK: No. The prosecutor --

QUESTION: It's not at all inconceivable. I mean, that -- that's why they always come up with a reason because, as I understand the way we formulated our -- our Title VII test, you -- you have to come up with an excuse, and if you don't have an excuse, the plaintiff wins. I'm -- I'm not sure I agree with that, but that's what our law is.

MR. BEDRICK: The prosecutor knows that he will look bad if he does not come up with a reason. A

prosecutor knows that the trial judge could infer that something is up or something has been done wrong if he doesn't come up with a reason. But our prosecutors are bright and energetic and talkative and garrulous people. They always have a reason for everything.

So in this case -- and even there are many cases. In the many cases where the question of prima facie case is being discussed and it looks like it's a close case, in many of those, a careful prosecutor will say, Your Honor, let's not hang this case up at the prima facie level. I would -- let's -- let me not leave a record that is not clear. I would like to tell you what my reason is and here --

QUESTION: May I ask you a hypothetical question? I hate to push you to the wall on it, but supposing you had a prosecutor who conducted the voir dire for the first day and then was hit by a truck and died and wasn't able to continue the trial. And he had made one challenge of one African American juror, but he had let six others on the jury. What -- what would you do with that case? Would that be a prima facie case or not?

MR. BEDRICK: With one juror challenged, six remain, from the defense perspective, I would say I have a very lousy -- lousy chance of making a prima facie case, and I would not make that argument.

QUESTION: What if there were one and otherwise it was an all-white jury?

MR. BEDRICK: Then I guess we would hope to find some evidence of the prosecutor's reason. Perhaps he had --

QUESTION: I'm -- I'm positing a case in which for reasons beyond the control of the prosecutor, they can't tell what the real reason was of the man who conducted the voir dire.

MR. BEDRICK: At that point I would suggest that the wise trial judge would find a prima facie case, avoid any possible discrimination and ask jury selection to begin anew. At that point, the cost to the system is 1 day of poor jurors parading through. That's a much lower cost than the risk of this case going to the jury and being tried by a jury that has been chosen with racial discrimination.

QUESTION: What if it comes up -- comes up on appeal? I mean, it's happened. In the case -- because the trial judge lets the case go forward.

MR. BEDRICK: I -- I need some more facts.

QUESTION: No. The appellate court has to decide whether -- whether the conviction has to be thrown out --

MR. BEDRICK: Yes. The --

QUESTION: -- on the basis of a -- a strike that the appellate court has no way of finding out the reason for.

MR. BEDRICK: If --

QUESTION: The only prospective black juror was struck.

MR. BEDRICK: That is why we are arguing here for this -- for the threshold that we are arguing for, which is a relatively -- relatively low threshold at which the trial judge examines all the circumstances and, when in doubt, rules that there should be a prima facie case, and then we get an answer, and then the trial judge makes a decision based on an answer, and then we get a record.

QUESTION: Why do you say when in doubt? I mean, isn't it enough to say the trial judge has to -- can find that there's a prima facie case of discrimination, but why slant it one way or the other?

MR. BEDRICK: Because in response to the last question, I was trying to show that one of the things that are missing when a -- when the questions are not asked of the challenger is a record. We do not know what the answer would be, and that puts the appellate court in a much more difficult situation. So that is what I was saying. When we're -- when in doubt, one of the benefits that we obtain from an answer is a record so that it can

be reviewed.

Furthermore, my guess is most of the prosecutor's answers will, in fact, show race-neutral reasons. Then we have no problem. Everyone knows what the situation is. The answer has been revealed. It does not become an appellate issue and everyone then has confidence that the jury has been fairly chosen.

QUESTION: Tell me how it works. You have some suspicion, because of the issues in the case and so forth after the first minority juror is excused, and say oh-oh, there may be something going on here. At -- at what point under California procedure do you think you should make the objection? At the earliest possible opportunity when they've excused the first minority juror or you wait until the whole jury is empaneled and ready to be sworn? How does that work?

MR. BEDRICK: I would say it depends on the discretion of the objecting party. If there was only one minority juror and defense counsel thought that that was a good juror and therefore smelled possible discrimination, then defense counsel might make the challenge at the time of the first juror. If --

QUESTION: What happened here? Was it after the second juror or after the first?

MR. BEDRICK: The first motion here was made

after the second African American juror and the second --

QUESTION: And then renewed on the third.

MR. BEDRICK: -- and the second motion was made after the third African American juror. So defense counsel did not -- did not make his motion at the earliest possible opportunity. He may have been giving his opponent the benefit of the doubt. But after the opponent challenged two out of two, he no longer thought there should be a benefit of the doubt.

QUESTION: And under your procedure, how long would this take? You say, Your Honor, I want an inquiry into why this juror was excused and the -- I guess the judge excuses the -- the panel, or the prospective panel, and then says, Mr. Prosecutor, can you tell me why you excused the jury. Is that the way it works?

MR. BEDRICK: Yes. In -- in this --

QUESTION: Don't -- don't they just go up to the bench? Do they have to excuse the whole jury panel?

MR. BEDRICK: I've seen it done all different ways. I've seen it done out in the back hall. I've seen it done at the bench. I've seen it done with the room cleared, and I've seen it done in front of the whole jury. They do it all different ways.

QUESTION: What happened here?

MR. BEDRICK: Here both motions were discussed

outside of the presence of the jury, and that was, of course --

QUESTION: And the trial judge did what? He decided on his own that there were good reasons?

MR. BEDRICK: The trial judge in this case on the first motion, decided that there was no prima facie case because the trial judge speculated as to possible reasons on the record that might theoretically and arguably have provided a race-neutral reason.

QUESTION: And was the judge asked if the prosecutor could be asked to explain?

MR. BEDRICK: The trial judge asked the prosecutor, Mr. Prosecutor, I'm about to -- I'm in the -- I'm about to rule that there's no prima facie case. Do you have anything you want to add? Do you have any reasons you want to state? And the prosecutor said, no, Your Honor, I don't want to --

QUESTION: Well, why should he --

QUESTION: Why should he?

QUESTION: -- if he's already been told?

(Laughter.)

MR. BEDRICK: That was clearly too late in the process, but there are many other cases I mentioned earlier where when a prima facie case seems relatively close, the intelligent prosecutor will give a reason and

make his record and protect his record.

QUESTION: Counsel --

QUESTION: -- in the law --

QUESTION: -- before you exhaust your time here, on appeal did you challenge also an evidentiary point, a Brady claim?

MR. BEDRICK: There are other issues --

QUESTION: There are other issues in the case.

MR. BEDRICK: Yes.

QUESTION: The Brady claim, some evidentiary -- and -- and a new trial was granted on some of those issues?

MR. BEDRICK: No. This -- this case has been tried three times. In the -- the first case got three-quarters of the way through. There was a Brady problem. A mistrial was granted. There was a second trial. There was a conviction after the second trial. In that second trial, there were instructional errors regarding concurrent causes. There was a reversal on that. This now is the appeal from the third trial.

QUESTION: On the third trial, were there other issues?

MR. BEDRICK: There are other issues that the court of appeal did not reach.

QUESTION: That were not reached.

MR. BEDRICK: Yes.

QUESTION: But do we have a jurisdictional problem? Do we have a final judgment?

MR. BEDRICK: We certainly have a -- we certainly have a final judgment from a trial which is a conviction of the defendant. We have a -- we have a decision from the intermediate court of appeal that says reversed. We have a decision from the State supreme court that says reversed again. So that we have lost our -- we have lost our Batson argument.

QUESTION: Well, but it's sent back. Wasn't it sent back to the court of appeals for further proceedings in this case?

MR. BEDRICK: The -- yes.

QUESTION: Well --

QUESTION: And you may win on two -- on either of two issues that are left in the court of appeals.

MR. BEDRICK: That is theoretically possible, but I think --

QUESTION: But that's on three of those issues. Isn't it the case that the intermediate appellate court said there's something going for your side on those three? It's kind of hinted that you have a good case on the issues that didn't get decided.

MR. BEDRICK: Yes, that's correct, Your Honor,

but I very much hope that the Court would reach the issues here. We've put in a lot of time on that.

QUESTION: But we have a firm finality rule. So how can we if the judgment that you're bringing to us is non-final?

MR. BEDRICK: I believe that --

QUESTION: We've put in a lot of time on it too.

MR. BEDRICK: I understand.

(Laughter.)

QUESTION: I -- I --

MR. BEDRICK: We have a -- California has -- differs from every other court in the Nation on several of these jury selection points. California has a standard that is much higher than virtually everyone else in the Nation.

QUESTION: We understand that it's a good case to address the issue, but only if there's a final judgment so that we have jurisdiction. Can you enlighten us any more on that jurisdiction point?

MR. BEDRICK: This issue has not been raised by either side in this case.

QUESTION: Well, it's raised now.

MR. BEDRICK: I understand that, Your Honor. So that it is my understanding that we have a final -- we have a final judgment from the trial court of convicting

the defendant. We have what is a final judgment from the intermediate court of appeal, which was a reversal. That court did not need to reach the other issues. It felt it did not need to bother to reach them.

QUESTION: But now it does because it's been reversed and there's a remand. And when it's remanded, it is certainly going to take up the issues that it left undecided.

MR. BEDRICK: If it needs to reach those, that's correct, Your Honor.

QUESTION: Well, it's been instructed. There -- there are exceptions under our Cox case, and I've looked at them. I don't think this comes under them. We don't like to ambush you this way, but I mean, if there's a -- there's a real jurisdictional problem here.

QUESTION: Especially since we gave you the case to -- to argue. You are very kindly appearing here pro bono.

(Laughter.)

QUESTION: It seems like a dirty trick.

(Laughter.)

QUESTION: No. But may I ask on the finality question? Is the decision of the California Supreme Court final with respect to the disposition of the Batson claim?

MR. BEDRICK: It very much is, Your Honor.

QUESTION: There's nothing more to be decided relevant to that issue.

MR. BEDRICK: Absolutely not.

So that what I was hoping to argue to the Court was we have a very distinct and sharp conflict between the State of California and the Ninth Circuit and, indeed, between the State of California and the rest of the country on several of these issues. What is the --

QUESTION: May I ask you one question that is relevant to that? And that is, that California, as I understand it, is taking the position each State is free to implement Batson as it chooses, and California points out that it has a standard that's more stringent than the Federal standard on disqualifying a juròr for race bias. The California standard is significant likelihood that the juror is biased, where the Federal standard is a reasonable possibility. So California says if we can have a more stringent standard on disqualifying a juror for race bias, why can't we have a more stringent standard on Batson.

MR. BEDRICK: Because California did not present any federalism issues at the State supreme court nor does my opponent. California said we are deciding the Federal constitutional issues. We are deciding this case under Batson. We believe that our standard complies with

Batson.

QUESTION: I thought part of that was that Batson leaves room for the States. It doesn't require every State to -- to handle Batson challenges the same way. I think that is an argument that California made.

MR. BEDRICK: There are -- there -- there are some -- I'm not sure what aspects were left to the States, but California's Supreme Court did not -- the State makes this argument, but the California Supreme Court did not. The California Supreme Court did not say anything addressing any independent State ground.

QUESTION: More a question for the State than for you.

I -- I can't really think of àn analog here. Our search and seizure jurisprudence, our arrest jurisprudence, our Miranda jurisprudence is all uniform. Here, of course, State jury selection procedures vary, and so there has to be some allowance for that. On the other hand, I'm not sure what the State is going to tell me so far as a helpful analog for having a different -- different rule.

MR. BEDRICK: The best standard we could come up with, Your Honor, was something that was similar to the standard on a Federal civil procedure 12(b)(6) motion. On a motion to dismiss, could a reasonable trial -- could a

reasonable trier of fact find for the plaintiff? That was -- that is the closest analog we have.

QUESTION: Yes, but what you're talking about is a judgment at the close of the plaintiff's case, aren't you? You're not talking about a motion to dismiss a complaint before trial.

MR. BEDRICK: That -- that's what 12(b)(6) would be, Your Honor. So the question is can the plaintiff get out -- can the plaintiff get out of the batter's box. So that that is -- that is the type of language that -- that we are seeing in the Federal courts interpreting the raise in inference.

That's also what we are -- in Title VII contexts we're actually seeing a lower threshold. In Title VII, to establish a prima facie case, the plaintiff needs to show that he was part of -- of a protected group, that he was qualified for a job, that he applied, that he was rejected, and the employer is still looking.

QUESTION: But you -- you do have some difference on a motion to dismiss because the rule is that if any conceivable allegations could have been proved in support of what the complaint says, it shouldn't be dismissed. But at the close of the plaintiff's evidence, I think it's a little more stringent. It's what -- what does the plaintiff's evidence show, not what could it have

shown.

MR. BEDRICK: I -- I guess I'm persuaded that we are somewhat higher than rule 12(b)(6). I think we're also somewhat lower than reasonable suspicion. But I think this standard comes up in many other kinds of motions where ordinary civil procedure motions where a plaintiff wants to proceed and for -- a motion for challenged discovery, for example. The plaintiff wants to proceed and the defendant says we don't want our witness brought in here. He's an important person. He's an officer of an important corporation, and the judge -- show me why we should take that person's deposition. Now, you don't have to prove anything beyond a preponderance. You need to show some reasonable facts that can be learned from that person. In this --

QUESTION: But the typical discovery motion isn't appealable, so there isn't much writing on the subject of what sort of a standard should apply in that sort of discovery.

MR. BEDRICK: But it -- it could turn out to be appealable. The chances of them showing prejudice are limited, but it's the same kind of situation. The plaintiff here is trying to obtain some evidence, and here it's actually the crucial evidence so that in my discovery analogy, it wouldn't work for -- it wouldn't work for

garden-variety discovery, but if we had a major witness and a major point, that issue might show up as a -- as the -- as the issue on which an appeal turned.

Here the information we're trying to find is -- goes to the guts of the question of racial discrimination. It goes to the reason that the prosecutor -- the reason for the prosecutor's challenge. The trial judge has to decide whether there is a race-neutral reason and whether that was in fact the prosecutor's reason and whether that reason was credible. None of that can be determined unless we know the prosecutor's reason.

QUESTION: What if -- what if the trial court at the prima facie stage says it -- it seems perfectly obvious to me -- and I think this is perhaps what the judge here did -- that the reason the prosecutor did this was thus and so. And then the -- so he doesn't call on the prosecutor, but nonetheless, it's very plausible what he said. Now, isn't that a form of harmless error?

MR. BEDRICK: I can't see anything remotely obvious here, Your Honor, between the State judges and the attorney -- State Attorney General's office has speculated as to two reasons for challenges to Clodette Turner. They speculated as to five possible reasons for the challenges to Sara Edwards, and they speculated on eight possible reasons for the challenges to Ruby Lanere.

QUESTION: Well, what -- what --

MR. BEDRICK: If it was so obvious, they wouldn't have 15 speculations.

QUESTION: What if the prosecutor, after the prima facie stage, says I did it for this reason? All parties -- the -- the defense isn't bound by that statement, is it? But I suppose the prosecutor is.

MR. BEDRICK: The prosecutor is, and then the defense gets to argue, as one does in a Title VII case, that there is something wrong with that answer which therefore shows prejudice. Perhaps the prosecutor has said I challenge this juror because in voir dire, the juror said he was -- I believe the juror was illiterate. And it turns out the question was, Mr. Juror, how do you get your news? From the newspaper or television? And the juror said, I get it from television. And the prosecutor thought that showed illiteracy. If that's the test for literacy, then two-thirds of our population is illiterate.

That's why we need to get the reasons. The -- the defense is not bound by it. The defense is entitled to show that the reason may be pretextual. Sometimes it will be. Sometimes it will not. But unless the -- the whole guts of Title VII where the employer always gives a reason is trying to show in one way or another from the facts and circumstances and all the evidence that the

reason is pretextual. And that should apply in -- in -- under Batson in the same way. But one cannot evaluate from either position, from the defense position or the prosecution position, whether the reason is pretextual unless one hears the reason.

And if --

QUESTION: I suppose -- suppose one problem that is more difficult in the Batson context -- we're talking about a reason that would justify a peremptory challenge, not a challenge for cause. And I imagine that a good judge and a good lawyer could come up with that kind of reason for almost any potential juror.

MR. BEDRICK: We are -- most of the time the -- the prosecutors are going to have race-neutral reasons. All -- all we're doing is asking for, to check for the unusual circumstance when the reason is not race-neutral or when the reason is pretextual.

QUESTION: I thought you didn't need a reason for a peremptory challenge. I thought that's the beauty of -- of a peremptory challenge.

MR. BEDRICK: A peremptory challenge --

QUESTION: I don't know. There's just something about this guy. I just -- you know, my antennae tell me that this person isn't going to be good for my side of the case.

MR. BEDRICK: A peremptory --

QUESTION: Is -- is that enough of a reason?

MR. BEDRICK: A peremptory challenge is valid for any reason except an unconstitutional reason.

QUESTION: Right.

MR. BEDRICK: When this Court considered Batson, the argument made by the State is we have a peremptory challenge statute which is very important and you shouldn't just brush it aside. And this Court decided in Batson, yes, peremptory challenge statutes are important, but the Equal Protection Clause and the U.S. Constitution are even more important, and as in the conflict between those two, the Equal Protection Clause, which is preventing racial discrimination, which is protecting the rights of the individual jurors not to be discriminated, which is protecting the right of the defendant not to be tried by a jury chosen with discrimination, and which is protecting the rights of the public not to have the criminal system upset by discrimination, the -- this Court in Batson decided that the Equal Protection Clause under -- trumps the right for --

QUESTION: So what I said wouldn't suffice. You say that wouldn't suffice as a reason.

MR. BEDRICK: I would say any -- I would say a -- the -- I don't want to put you -- Your Honor in those

shoes, but a prosecutor -- we've never seen a prosecutor not have a reason. So if you -- so if you were the prosecutor and you said, I have a hunch, the trial judge would probably ask, counsel, please I need more than a hunch. Please give me the reason for your hunch. And your answer is I don't like jurors who have beards, I don't like jurors who have long hair, I don't like postal workers, some basis for the hunch. Any prosecutor who is not discriminating would have a basis for that hunch.

If there are no questions, I'd like to save my remaining time for rebuttal.

QUESTION: Very well, Mr. Bedrick.

Mr. Schalit, we'll hear from you.

ORAL ARGUMENT OF SETH K. SCHALIT

ON BEHALF OF THE RESPONDENT

MR. SCHALIT: Mr. Chief Justice, and may it please the Court:

The more likely than not standard identified by the California Supreme Court gives content to the prima facie case requirement and preserves the proper balance between the anti-discrimination principles enshrined in the Equal Protection Clause and the State's and parties' interest in using peremptory challenges to select a qualified and unbiased jury.

QUESTION: Just so we can get it behind us, do

you have any observation on the apparent jurisdictional problem we have? Can you give us a hand?

MR. SCHALIT: I'll attempt to do so, Your Honor. The situation I think is akin to that under which multiple claims are raised and a court of appeal disposes of it based on one ground and does not discuss anything else. And that court is therefore -- thereafter reversed on appeal. I think that is a final judgment. The -- the defendant in this case has been deprived of his reversal and that is what --

QUESTION: Even when it's been remanded, when the judgment is, you know, I decided on this ground and then I remand it for further proceedings in the case?

MR. SCHALIT: I think so, Your Honor, in that the -- the legal issue is -- is still present as to the --

QUESTION: That's not the test. The test is whether the case is final.

MR. SCHALIT: Regrettably, Your Honor, unfortunately I haven't had time --

QUESTION: Yes, we sort of sprung it on you.

MR. SCHALIT: Yes.

QUESTION: Okay. I just thought you might have an answer.

MR. SCHALIT: That's as best as I can do. My apologies.

QUESTION: You have an issue that's finally decided in this case.

MR. SCHALIT: Correct, Your Honor.

QUESTION: And that will be law on the case. But you don't have a judgment, a final judgment in the case because now there are all those issues that the intermediate appellate court said it left open. It gave some hints about what validity it thought they had, but -- but there is -- there are a number of issues that are still to be opened. So the judgment isn't final. Only one issue in the case is.

MR. SCHALIT: My apologies, Your Honor. Beyond what I've already articulated in terms of that -- deprivation of that reversal based on that issue is the extent of my knowledge, this issue not having been briefed.

QUESTION: May I ask you this question about the California standard? Is it -- did you just say the standard is the judge must decide that it's more likely than not that there was discrimination? Or -- and I think it would be quite different to say -- the judge must decide that a reasonable juror could conclude that it's more likely than not that there was a -- discrimination.

MR. SCHALIT: No, Your Honor. It is not the latter test.

QUESTION: It's not the latter.

MR. SCHALIT: No.

QUESTION: And why shouldn't it be the latter?

MR. SCHALIT: Because the judge is operating as the fact finder in this setting, and given the nature of the prima facie case requirement, which is one that when the prima facie case is met, entitles the objecting party to prevail --

QUESTION: In your -- in your ordinary civil trials, which view does the -- is -- what is the rule in California? Would -- would it be the one I stated or the one you stated?

MR. SCHALIT: That depends on the function of the prima facie case in term -- in -- in the context in which it's being used. There are two --

QUESTION: Say it's a tort case where he sued for, you know, negligence in driving a car. Which -- which would be the correct statement under California law?

MR. SCHALIT: Well, if it is a question of has the --

QUESTION: Do I let the case go to the jury? That's what's before him.

MR. SCHALIT: If that's the question, then it is an inference --

QUESTION: It's whether a reasonable jury could

find that there was --

MR. SCHALIT: Correct, Your Honor.

QUESTION: And why do you say there's a distinction here? I -- I understood you to -- to say that the -- the distinction rests on the fact that the -- at the -- at the close of -- of whatever argument or point the -- the defense counsel makes, that he's entitled, in effect, to -- to win the point. But that's not so.

MR. SCHALIT: In the face of his opponent's silence, Your Honor --

QUESTION: In the face of silence.

MR. SCHALIT: Correct, Your Honor.

QUESTION: That's a further -- I mean, a further fact in evidence. I mean, if -- if somèbody puts in a -- a permissive case in a -- in a civil action and the defense puts in nothing, the -- the jury may or may not ultimately award for the -- for the plaintiff. They may -- but in -- in this case, I take it the way it works, there is a -- a presumption that aids the objecting party and therefore the objecting party wins. Is -- is that your understanding?

MR. SCHALIT: Essentially, Your Honor.

QUESTION: Yes.

MR. SCHALIT: In the -- in the Batson context. It is not a presumption in the McDonnell sense of having

proved certain predicate elements.

QUESTION: Okay. But if the -- if, on the other hand, the prosecutor does make a response, then there's no presumption. Then the -- the judge simply has to make a determination.

MR. SCHALIT: Correct, Your Honor. The judge must evaluate the response and the -- and the rest of the evidence in determining whether the objector has met his ultimate burden of persuasion.

QUESTION: And -- and when he does that, he may very well, in effect, say, yes, there's evidence here from which I could infer discriminatory intent, but I don't infer it. I am not wholly convinced by it for whatever reason. And that's -- that's a possible resolution by the court, isn't it?

MR. SCHALIT: In a stage three, Your Honor, of a Batson proceeding?

QUESTION: Yes.

MR. SCHALIT: Yes.

QUESTION: So at -- at the last stage, the trial judge is acting as if he were -- it were a bench trial, and it's up to him to decide whether there was or was not a discriminatory purpose.

MR. SCHALIT: Correct, Your Honor. Having now heard the reasons, the trial court will evaluate the

credibility of the prosecutor. As the plurality recognized in Hernandez, frequently the credibility of the striking party will be dispositive.

QUESTION: But -- but if no reasons are given, it's your position that automatically it's determined that there's a constitutional violation.

MR. SCHALIT: Correct, Your Honor. That is --

QUESTION: The other side says no.

MR. SCHALIT: Well, that ignores the disposition in Batson itself in which the Court explained that on remand it was up to the trial court to determine whether there was a prima facie case, and if the prosecutor did not come forward with his race-neutral reasons, the judgment had to be reversed. It is that --

QUESTION: But isn't the -- the position that -- that you are advocating, if I understand it correctly, is that the court saves the prosecutor that burden by the court, before turning to the prosecutor, to say what's your nondiscriminatory reason. The court itself first thinks of can the court think of a good reason, and if the court thinks of a good reason, it never asks the prosecutor. That's the -- that's -- as I understand your case, you say that's how it works.

MR. SCHALIT: Not entirely, Your Honor, in that it is not the court's obligation nor do California courts

seek out to save the striking party. What they do do is attempt to determine whether the objecting party has met its burden of persuasion at that first step, and in considering everything before it, it will make that determination. Now, there may be --

QUESTION: Well, do you think -- suppose there were 12 peremptory challenges and there were 12 African American prospective jurors there and all of them were stricken. Is there enough case made if there's an objection by the defense counsel?

MR. SCHALIT: Well, Justice O'Connor, certainly numerosity is an important point or an important consideration.

QUESTION: -- in my example.

MR. SCHALIT: Your -- Your Honor, your example actually needs additional facts. If, for example, one of those African American prospective jurors said, I hate cops and the second was wearing, you know, crypts colors in a case involving the blood, and the third was half asleep and the fourth had some other obvious explanation, then no.

QUESTION: Well, so, the trial judge can look into that as a part of the prima facie case. He can look into what the jurors responded?

MR. SCHALIT: Yes, Your Honor, because of the --

it is the trial judge's obligation under Batson to evaluate all the facts and circumstances. Batson itself recognized that the prosecutor's questioning during voir dire may support or refute --

QUESTION: Suppose I'm the trial judge and I consider, you know, there are reasons why the prosecutor -- legitimate reasons why the prosecutor might have exercised this challenge. Do I go further?

MR. SCHALIT: I think it's up to the trial -- trial judge to determine whether the objector has met his burden of persuasion as more likely than not. If I can see a legitimate reason --

QUESTION: Well, I -- the -- the case is the one I -- I gave you. There's an objection.` And I say, you know, there are reasons why this prosecutor might have done this. Do I quit at that point and say, well, you haven't made out your case? That's the way I understand the California rule, incidentally. If there -- if there are reasons that might have allowed the prosecutor to give the peremptory challenge, the prima facie case may not have been made out.

MR. SCHALIT: And I think it's important, Your Honor, to distinguish the rule as understood on appeal in California from the rule in application in the trial courts. It is not can we hypothesize a potential reason

in -- from the trial judge's perspective that there's a challenge here. It is up to the trial judge to determine from all of the evidence whether it is more likely than not. And maybe I have a reason but --

QUESTION: But it's very odd that he would do that without even asking the prosecutor to comment.

MR. SCHALIT: Not -- not particularly, Your Honor. If the prosecutor has --

QUESTION: I mean, it's odd in the sense that California is one of the only States that does it.

MR. SCHALIT: Well, Your Honor, if the prosecutor three African American prospective jurors, all of whom are defense attorneys and they're struck by the prosecutor, there's nothing odd about not asking about that. They're all defense attorneys.

If, however, maybe, you know, there was a little something that one of the jurors did and I can sort of see the reason for that, but they struck 12 of them and I sort of see a reason, that's not enough most likely in the more likely than not context. And the prosecutor will be required to state reasons.

Now, that is different than on appeal where, of course, the judgment of the trial court is presumed correct and the trial court is the entity that has seen everything. And if on the face of the record, there's

something that appears to be the reason, well, then that must be used on appeal, just as in the other appeal to support the judgment below. But it is the trial court's obligation to evaluate everything before it, and to determine --

QUESTION: Well -- no, I didn't mean to -- complete your -- the -- the problem I have with -- with, I guess, that argument and -- and with the California position is this. I assume that under Batson when and if the time comes for the prosecutor to make a response, we want a -- a context in -- in which the prosecutor at least has got a fair shake to -- to persuade the court. And on the California system, what you're defending, the judge does not, in effect, as the prosecutor for a response until the judge, in effect, has already found against him on the merits because on your view, the prosecutor has said implicitly, by a preponderance of the evidence, they have proven discrimination. Anything you'd like to say about that? That's a very different thing from saying, this side's case in and I might find for them, but I -- I haven't yet. What do you have to say? It -- it in effect on -- on the California scheme forces the -- the court to say I've already ruled against you based on the merits unless you say something.

MR. SCHALIT: Yes, Your Honor, and that is the

purpose of the -- of the prima facie case requirement. It is to allocate the introduction of the burden of proof and it is to protect the constitutionality of the State statute and the nature of the challenges as being peremptory.

QUESTION: But it puts the prosecutor in a -- in rather a difficult spot if -- if you get to that point.

MR. SCHALIT: Yes, and that --

QUESTION: Because the prosecutor has already been told you lose unless you've got a darned good reason.

MR. SCHALIT: Just as the employer is told that essentially in a Title VII case when the evidence is introduced on those four McDonnell Douglas factors and the evidence is persuasive.

QUESTION: But -- but it seems to me --

QUESTION: No.

QUESTION: -- the opposite is also true for what Justice Souter is saying. The -- the judge says, you're going to win unless you say something.

MR. SCHALIT: Well, then there's --

QUESTION: No.

QUESTION: So I -- I -- in that instance, he obviously says nothing.

MR. SCHALIT: Correct, Your Honor.

QUESTION: He doesn't say you're going to win.

He's going to say there is enough to require you to respond. Whether -- whether you win or lose is up to me after the response.

MR. SCHALIT: In the -- in the Batson setting, in the Title VII cases, in any case in which there is a prima facie case found, going back to Kelly v. Peters with Justice Story, there is such evidence that unless rebutted, the party with the burden of persuasion will prevail.

QUESTION: That is true if you've got a presumption working. It is not true if you simply have a -- a standard that -- that allows for the permissive inference. If -- if nothing more than a permissive inference is involved and the case -- and the defense puts in no case, the plaintiff may or may not win. The only thing that makes the difference is -- is whether a presumption operates to convert the permissive case into a victory, and whether the presumption is going to operate or not is a question of -- of policy. It's not a question of logical relationships.

MR. SCHALIT: Certainly it does operate when there is a presumption established by the court, as this Court did in McDonnell Douglas. It also operates when there is a -- what Wigmore referred to as a strong mass of evidence. That concept cannot be alighted from the

definition of a prima facie case in that --

QUESTION: May I ask you this question just to be sure I -- I have your position? The other side says California is the only State in the Union that follows this strict a rule and the Federal courts all follow the -- the other rule. Are they right on that, or do you think they're -- you have company in other parts of the country?

MR. SCHALIT: We are -- there are -- there are other cases that announced the same standard. Maryland announced it. Connecticut announced it. The court below recognized that. There are a handful of cases on the other side that recognize inference. The Ninth Circuit does.

QUESTION: The legislature overturned it in Connecticut. Isn't that so?

MR. SCHALIT: My belief is that actually the Supreme Court of Connecticut under its supervisory authority established a sort of --

QUESTION: Anyway, it's no -- Connecticut is not out of line anymore.

MR. SCHALIT: Not -- yes. They don't apply it, but they don't apply it based on their supervisory authority. As an understanding of the meaning of Batson, it's still valid. And because it's actually California,

Maryland, and Connecticut that have considered the meaning of Batson and the Title VII cases. The other cases -- the Ninth Circuit just looked at the word and said inference. They isolated that word from the rest of the Batson opinion. That's not the appropriate way to read an opinion. It must be considered in context. Batson expressly told the courts to look to the Title VII cases for an explanation of the operation of the prima facie case rules.

QUESTION: But in Title VII there would be a presumption if the employer said nothing. If the -- if the plaintiff shows the McDonnell Douglas factors and the employer doesn't come up with any reason at all, I thought at that point, plaintiff wins because there's a reasonable inference, plus presumption. Plaintiff wins. When defendant comes forward with a nondiscriminatory reason, then the presumption drops out of the case. Plaintiff shoulders the burden of persuasion.

MR. SCHALIT: Correct, Your Honor. And that is one example of a prima facie case with a shifting burden of production that entitles the party to prevail in the face of silence.

The other example included in that same section of Wigmore is the strong mass of evidence, and he later explains that those things are different in operation and

they differ -- but the same in effect. And the effect is the same. The operation is different and the operation --

QUESTION: But I thought that -- that this Title VII, the idea of reasonable inference plus presumption -- that that's supposed to be the formula for Batson as well.

MR. SCHALIT: Not presumption in the sense that there are four elements of McDonnell Douglas that apply in a Batson context. There can't be those four elements. Every time there's a challenge in a Batson setting, the four elements of McDonnell Douglas, for example, would have been met. The juror would have been a minority qualified, excused, and replaced.

So the -- the reference in Batson to the Title VII is not to a presumption, but to the operation of the prima facie case rules, and the operation of those rules are such that you provide sufficient evidence to entitle you to prevail in the face of silence. And Wigmore ties that together with being synonyms for the same mechanism. They are akin to presumptions.

QUESTION: I thought he said that the presumption operates in the run -- mine run of cases, it's the presumption that the -- what you call the strong evidence test -- that's Batson for special instances and it isn't the dominant rule.

MR. SCHALIT: That -- Your Honor, Wigmore

recognized there are these two means in which you can create the prima facie case. One is the presumption. And that is helpful in a case in which there's a run of the mill type facts and in the run of the cases, that fact that is presumed, more likely than not, follows from the predicate facts. That cannot be applied in Batson.

What does apply in Batson, however, is the other aspect of the prima facie case mechanism recognized by Wigmore which is the strong mass of evidence concept. That has to be what is applied here in that the nature of the jury selection --

QUESTION: The -- the problem with -- with this is, though, is that, say, in the employment discrimination case, there's been discovery. The events have happened outside the hearings of the court. There has been time to look at it. Here the alleged wrong is occurring right in the courtroom in front of the judge. And so all they're saying is that the judge should, in an appropriate case, say, hey, what's going on here, Mr. Prosecutor. That's all. And -- and it seems to me that's a very, very minimal intrusion on -- on the trial.

And the -- the State of California's rule seems to presume that the defense counsel, if -- if he's the one objecting, has the resources of discovery and -- and the opportunity to -- to reflect and -- and to find other

evidence. He doesn't. The jury is being selected now.

MR. SCHALIT: Precisely, Your Honor, and that is to his advantage. As -- as U.S. v. Armstrong recognized, the res gestae takes place in front of the court. It takes place in front of the parties therefore. Everything that that party needs is available to the party. This is not Swain where the objecting party would have to engage in some sort of historical discovery and analysis. Everything the party needs is there, and the striking party has --

QUESTION: Everything the party needs except the state of mind of the prosecutor, and the --

MR. SCHALIT: Correct, Your Honor, to which he is not entitled until he demonstrates entitlement to relief and is able to overturn the statute and make it unconstitutional as applied. This Court has already rejected --

QUESTION: Of course, the irony of that is that if -- if you had an ordinary civil lawsuit and the plaintiff files a complaint on information and belief -- I have good faith and belief such and such happened -- then he takes a deposition and asks the defendant did it happen. But here you can't do that. You got to know the answer to what your information and belief is before you file your complaint.

MR. SCHALIT: That's -- that's the nature of privilege of peremptory challenges, the nature of any other privilege that protects information.

This Court has already rejected this sort of inference standard in its voir dire cases. It's -- it requires that you inquire of jurors, if there's a possibility of -- not if there's a possibility of prejudice but if it's constitutionally significant.

QUESTION: Is it appropriate in a case like this to weigh, on the one hand, the importance of the interests that are protected by the Batson rule and, the other hand, the burden on the prosecutor by having to answer the question? Is that an important part of the analysis?

MR. SCHALIT: No, Your Honor.` It's not a question of the burden of the -- of the 10 seconds it takes to state an answer. It is a question of the burden on the peremptory challenge system and the effect on the voir dire process. A low standard will create an incentive to bring these motions more frequently. That requires excusing the jury every time. That requires taking a proceeding and getting an answer. And that may, in turn, require proceedings through rebuttal. Well, let's go through our dozen discharged jurors and piles of questionnaires to do a determination of whether this is pretext.

Moreover, it is the nature of the peremptory challenge system that is entitled to protection. These challenges are peremptory. We don't want to discourage challenges based on hunches which will be discouraged under a lower standard. This gives the trial courts a clear guidance.

QUESTION: Of course, there are those -- I remember Justice Marshall used to take the position that it would be better for the system as a whole if we entirely abandoned peremptories because you -- you're better off if you always know what the reason is. At least that's a permissible view.

MR. SCHALIT: Yes, that was his view, Your Honor. And the reason he had that view was because he did not like the Batson rule which required a flagrant showing of discrimination in order to rise to the level of a prima facie case. He understood that a prima facie case was one that entitled the party to relief. That was the --

QUESTION: But they -- most -- most jurisdictions -- most courts that considered this issue have the reasonable inference and that gives rise to the presumption. California is in a minority. Are you saying that California is right and everyone else is wrong? Or that you're both right?

MR. SCHALIT: Well, Your Honor, I'm not sure

that the numbers are that stark, given that most cases --

QUESTION: Whatever. There is a divergence.

MR. SCHALIT: There's certainly a divergence.

QUESTION: Now, are you saying there is only one right way and that's California's, or are you saying it's up to the States? They can have one rule or the other.

MR. SCHALIT: Your Honor, I think that certainly the footnote in Batson in the final part of the discussion recognizes the -- that it is left to the States to determine procedures to govern Batson. Now, on the other hand --

QUESTION: Does that mean -- procedures to govern -- that one State can have reasonable inference gives rise to presumption and in another, as California, can have strong likelihood?

MR. SCHALIT: Quite possibly, Your Honor, in that we believe more likely than not is -- is the result from Batson given the Title VII description. On the other hand, there is that -- that footnote and leaving to the States.

And it is not unheard of, to return to Justice Kennedy's earlier question, to have some variance. And I think one good example of that is incompetence and Medina v. California, which recognized that California could use the more likely than not standard and place that burden on

the party claiming he was incompetent. Other States can have a different burden.

QUESTION: Because you -- you said something about one of the reasons you're resisting this is it may -- it prolongs the trial and you have to clear the jury and the -- in the -- the places that have reasonable inference plus presumption, has there been this slowing down, the clogging of the court? Has -- has what you're predicting played out in reality?

MR. SCHALIT: Your Honor, I'm not aware of anyone having conducted a time in motion study of -- of voir dire in the various States to find out how they're proceeding. Certainly the system does not have to collapse in order to conclude that the more likely than not standard, with its advantages and its compliance with Title VII, with the holding in Batson, with the nature of declaring the statute unconstitutional as applied, is constitutionally prohibited. It is a somewhat surprising notion to suggest that using the lowest of the three basic burdens of persuasion is constitutionally prohibited.

QUESTION: I -- I did -- the question I asked you was just a purely practical one. Has what you predicted as the adverse consequences, if you loosen up the -- what the plaintiff has to show -- what the defendant has to show -- and my understanding is that --

that it hasn't been a big problem in the Federal courts, in States.

MR. SCHALIT: I think it's unknowable, Your Honor, that the -- the extent to which the system is burdened is not something that can be readily determined. You can infer that there is a burden imposed on it, one that California can legitimately seek to avoid by using the most common burden of persuasion.

QUESTION: Well, how does California handle a challenge for cause? Does it clear a courtroom every time someone makes a challenge to cause? Does it call counsel up to the bench to give their reasons simply to the judge on the record or some third way? How does -- how does it handle it?

MR. SCHALIT: Frequently it's done at the -- at the bench, Your Honor.

QUESTION: Well, this -- couldn't the same thing be done on -- on a Batson challenge?

MR. SCHALIT: It's not typically done that way. The -- the --

QUESTION: Well, why couldn't it be?

MR. SCHALIT: The -- the first step perhaps could be, but at some point there's going to need to be most likely further proceedings or to then go back and determine whether those reasons are pretextual. We'll

have to excuse the jury to go through the questionnaires and -- and do a comparison.

And that wouldn't happen in a -- in a challenge for cause. The -- the challenge for cause is pretty much over at that point because the judge knows it's just that one juror and -- and can make that determination based on that juror and -- and the information presented by the -- the challenging party. A Batson proceeding is much larger than that.

Your Honors, the -- the more likely than not standard is an appropriate standard. It is supported by the effect on the statute declaring it unconstitutional as applied. It avoids using an inference standard that does not provide guidance to the trial courts, a standard that this Court has already rejected in the voir dire context. It maintains the proper balance between the anti-discrimination goals of the Equal Protection Clause and the peremptory challenge system what this Court -- which this Court has repeatedly recognized plays an important function in serving the selection of a fair and qualified jury.

The judgment should, therefore, be affirmed.

Thank you.

QUESTION: Thank you, Mr. Bedrick -- or rather, Mr. Schalit.

Mr. Bedrick, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF STEPHEN B. BEDRICK

ON BEHALF OF THE PETITIONER

MR. BEDRICK: Thank you, Your Honor.

In this case, the prosecutor preempted all three African American jurors, leaving a black defendant to be tried before an all-white jury in a case that had racial issues. If this Court -- this is a paradigm of a prima facie case. This is a much stronger prima facie case than that which is required in virtually all of the Federal courts.

If this Court does not reach this question because it finds something that still is alive below, I respectfully submit that this Court would be sending a very poor message to the State courts and a very poor message to the Federal courts, namely, that yes, it is technically in error but it's not important enough for us to decide. I'd respectfully ask the Court to reach this issue.

In terms of what would happen if the States -- at the State court, I don't think I -- I could never get back to this Court or anywhere else. Let us say I go back to the State court of appeal. The State court of appeal rules against me on the evidentiary issues and says, counsel, on the Batson issue we'd like to rule for you but

the State supreme court said no, so we can't do anything. Review at the State supreme court is discretionary. I file a petition for review and the State supreme court says we decide that -- we already decided that. We don't care. Get out of here. Review dismissed.

I then will be trying to come to this Court, having gotten no opinions from the court of appeal, having gotten a postcard denial from the State supreme court and I would not be able to get here. I think that will be --

QUESTION: Yes, you would. You'd have a --

QUESTION: We'll be waiting.

(Laughter.)

QUESTION: You'd have a decision from the highest Court in the State that has rulèd on it, and you could -- you could come here. You would have then -- let's say you have a judgment affirming the conviction. You could come here from that.

MR. BEDRICK: If -- if that was a guaranteed invitation, Your Honor, I would accept it.

(Laughter.)

MR. BEDRICK: But odds on getting to this Court aren't quite so guaranteed as --

QUESTION: We will -- we will already have done the work. Your odds are better than most people.

(Laughter.)

QUESTION: So will you.

MR. BEDRICK: Yes.

QUESTION: Well, and importantly, we know what the California Supreme Court's final word is on it already.

MR. BEDRICK: We don't know. Every time around, they make up a new definition. The had strong likelihood. They had not -- they had dispositive inference. They had conclusive presumption. This time we -- this time they made up more likely than not. They may make some other standard. We don't know what they're going to do, and it's a -- it's a moving target and it is -- the target is moving in the direction of denying -- denying consideration of these cases and the target is moving in the direction of denying the opportunity to show whether or not there's discrimination.

If the California court's standard of preponderance of the evidence is allowed to apply, we believe that will eviscerate Batson because that means you cannot get in California what you would get -- at least eviscerate Batson in California because that would mean you cannot get in California what you could get anywhere else in this country on these facts --

QUESTION: But maybe they can get it from the Ninth Circuit.

MR. BEDRICK: That is possibly true.

QUESTION: It's definitely true. Hasn't the Ninth Circuit disagreed with the California Supreme Court?

MR. BEDRICK: Yes, and we have this continuing battle where counsel is required to spend and waste enormous amounts of time going back and forth and back and forth. I mean, I guess this case could become my career. I'd sort of ask the Court --

(Laughter.)

MR. BEDRICK: -- to let me go on and -- I want to represent my client, but I'd ask the Court to let me go and do something else.

(Laughter.)

MR. BEDRICK: In conclusion, Ì would ask to point out to the Court that obtaining the reason is the most important thing we're asking here. It's very simple. Most of the time it will solve the problem. We won't be bouncing back and forth between courts.

Discrimination cannot be shown unless the challenger's reasons are known. I would ask this Court to decide this case in a way that challenger's reasons become known.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bedrick.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)